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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1988

DOMINIC MONTEMARANO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION OF DOMINIC MONTEMARANO FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1). Was petitioner's Constitutional right to compulsory process violated when the trial court refused to authorize subpoenas for witnesses sought to be called by the pro se defendant and joined in by the defendant, Montemarano?

2) Was petitioner's Constitutional right to due process violated by the admission into evidence of a series of tapes known as the "Palma Boy tapes"?

3) Did the admission into evidence of photographs depicting petitioner as he was entering and/or exiting church services violate his constitutional right to freely exercise his religion?

LIST OF PARTIES

The parties to the proceedings below are: the petitioner, DONOMIC MONTEMARANO, HAROLD J. BOREANAZ of Counsel, 736 Brisbane Building, Buffalo, New York 14203; Co-defendant RALPH SCOPO appearing PRO SE with AUSTIN CAMPRIELLO as Advisory Counsel and JUDD BURSTEIN as Appellate Counsel; and the respondents, RUDOLPH W. GIULIANI, United States Attorney for the Southern District of New York, One St. Andrew's Plaza, New York, New York 10007, PETER M. LIEB and AARON R. MARCU, Assistant United States Attorneys, of Counsel.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	*i*
LIST OF PARTIES	*i*
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	
A. Sixth Amendment: Compulsory Process	5
B. Fifth Amendment: Due Process	8
C. First Amendment: Freedom of Religion	11
CONCLUSION	13

TABLE OF AUTHORITIES

	Page
Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972)	12
United States v. Garvin, 565 F2d 519, 520 (8th Cir. 1977)	7
United States v. Gigante, 538 F.2d 502, 506 (2d Cir. 1976)	9
United States v. Salerno, No. 86 CR 245	10
United States v. Valenzuela-Bernal, 458 U.S. 858, 867, 102 S.Ct. 3440, 3446, 73 L.Ed.2d 1193 (1982)	6

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit of New York entered on October 28, 1989, affirming petitioner's conviction.

OPINIONS BELOW

Petitioner was found guilty by a jury in the Federal District Court of the Southern District of New York and sentenced to serve 18 years imprisonment. Petitioner's conviction was affirmed on appeal by the Second Circuit Court of Appeals in an opinion published at 861 F2d 339.

On January 4, 1989, co-defendant Ralph Scopo's Petition for Rehearing was denied, a copy of which is attached hereto.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. 1254 (1). Petitioner's conviction was affirmed on October 28, 1988, denial of the co-defendant's petition for rehearing was dated January 4, 1989 and mandate issued on February 9, 1989. This petition was filed timely, within 60 days of the order denying the petition for rehearing.

STATUTES INVOLVED

Title 18 U.S.C. 2518:

§2518 (8)(a): "The contents of any wire, oral or electronic communication intercepted by means authorized by this chapter shall, if possible, be recorded on tape or wire by other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon any order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517."

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT I, Religious Freedom: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;"

AMENDMENT V, Due Process: "No person shall be ... deprived of life, liberty, or property, without due process of law; ..."

AMENDMENT VI, Compulsory Process: "In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Petitioner was indicted in 1984, charging him and others with participation in a racketeering enterprise referred to by the government as the Columbo Organized Crime Family of La Cosa Nostra. Petitioner was severed from the original trial on this indictment due to serious health ailments (including cancer surgery shortly before the original trial was scheduled to begin). The indictment which brought the petitioner to trial (with one co-defendant, Ralph Scopo) was a substantially redacted version of the original indictment. Further, a number of the counts in this redacted indictment were dismissed on government motion during the trial. On July 17, 1987, petitioner was found guilty of conspiracy and substantive RICO violations, conspiracy to commit extortion and eight extortion violations, unlawful payments to a union official, and bribery.

The government's theory of petitioner's participation in this organization, as presented at trial, was his alleged role as a "captain" or "capo" in the family through allegations that he assisted in both the collection of the organization's construction industry

extortions* and the bribery of a federal official to obtain a preferred prison designation for a "boss" in the organization.

The bulk of the proof at trial centered on audio tapes of various individuals purportedly discussing the business of the organization. There were also photographs and oral testimony to support the existence of the organization.

Because petitioner's co-defendant, Ralph Scopo, was proceeding pro se, the District Court required him to make offers of proof as to relevance of any witnesses he sought to call. Therefore, Mr. Scopo was not allowed to present any witnesses unless the District Court authorized him to issue the necessary subpoenas. During the trial, Mr. Scopo made an offer of proof requesting that subpoenas be issued to a number of people in the construction business who would testify that they were never extorted by the organization. Petitioner joined in this application. The trial judge refused to issue the subpoenas, ruling that the testimony would be collateral.

As stated above, the bulk of government proof presented at trial was in the form of audio eavesdropping tapes obtained during an extensive investigation of Organized Crime in the District. Throughout this trial, many of these tapes were admitted into evidence over petitioner's objection. Particularly, there was a series of tapes, referred to as the Palma Boys tapes, admitted into evidence. Petitioner's objection to the admission of these tapes was that the statute governing the process by which eavesdrop-

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* It was alleged that all construction jobs worth two million dollars or less belonged to this section (Family) of the organization. Contractors were to pay one percent of the gross contract price of every job (of $2 million or less) in order to prevent labor or supply trouble. It was also alleged that there was another category of construction contracts worth over two million dollars, of which all of the extortion payments "belonged" to another "Family" within the organization. Petitioner's indictment charged membership in the organization as well as involvement in the extortion scheme of the construction contracts worth two million dollars or less.

ping tapes must be handled has been violated, thereby rendering them inadmissible for lack of the required court seal. The trial court admitted the tapes as hearsay declarations of others (co-conspirators) to show petitioner's "membership" in the organization, which was the subject of the first two RICO counts of the indictment.

Among the photographs presented at trial as evidence of petitioner's membership in the illegal organization were pictures of petitioner and others (allegedly involved in the organization) which were taken while petitioner was attending various religious ceremonies (the pictures depicted petitioner in the entrance of the church, either proceeding to enter or exit the church). Defense counsel for petitioner objected to the admission of these photographs on the ground that admitting such as evidence of some criminal association would have a chilling effect on one's constitutional right to attend religious ceremonies. The trial court admitted the photographs over such defense objection.

REASONS FOR GRANTING THE WRIT

A. *Sixth Amendment: Compulsory Process*

The Sixth Amendment to the United States Constitution ensures that ... "In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." Petitioner has been denied this right.

This issue arose as a result of the District Court's restriction of co-defendant, Scopo's defense. Because of Mr. Scopo's *pro se* status, the judge insisted upon a prior review of the people he planned to call as witnesses. Only upon a finding that the proffered evidence was admissible from the court's point of view, would the judge authorize the service of a subpoena upon the

witness. Petitioner, having joined in the offer of proof, was also bound by the court's rulings in this respect.

The witnesses who were the subject of the requested subpoenas were thirteen persons involved in the construction industry (the "industry witnesses"). Their testimony was sought to show that there was no scheme to extort contracts above the two million dollar level and that the organization via Ralph Scopo had never extorted money from them. The trial judge reasoned that because the indictment's substantive extortion counts only charged the petitioner and his co-defendant with extortion involving contracts worth two million dollars or less, the court, therefore, ruled that such testimony would be inadmissible as a collateral matter and denied the subpoenas.

The terms of the Sixth Amendment invoke in the accused the right to have compulsory process for obtaining witnesses in his favor. It is recognized that one who claims this Constitutional right to have been violated "must at least make some plausible showing of how their testimony would have been both material and favorable to his defense." *United States v. Valenzuela-Bernal,* 458 U.S. 858, 867, 102 S.Ct. 3440, 3446, 73 L.Ed.2d 1193 (1982). It is respectfully urged that more than the minimal "plausible showing" as reflected above was presented to both the trial court and the Court of Appeals for the Second Circuit.

On appeal, the Court of Appeals for the Second Circuit also found that the testimony of the "industry witnesses" would have been collateral. This finding was based upon the reasoning that such testimony would not have contradicted any of the charges in the present indictment. The "charges in the present indictment" that the court refers to only focus on the substantive extortion counts of the indictment.

What the court overlooked, however, were the conspiracy and substantive RICO counts also 'charged in the present indict-

ment.' Indeed the RICO charges were the main focus of the entire prosecution. The existence of the construction contract extortion scheme, whether it be for over or under two million dollars, was the central theory upon which the government claimed the entire organization existed.** It was membership in this organization which formed the basis for the two RICO charges against petitioner and Mr. Scopo.

Therefore, what the court could have construed as collateral to the substantive extortion counts of the indictment, is nevertheless critical to the main focus of the indictment, i.e., the two RICO counts. This presents a "plausible showing" of how this testimony would have been "both material and favorable" to petitioner' defense. *Id.*

The fact that the government alleges this construction contract extortion scheme as part of the overall structure of the La Cosa Nostra and charges petitioner with membership therein, thrusts the entire scheme into scrutiny as a central issue in this case. Just as similar acts are relevant as circumstantial evidence of a plan, system or scheme, so is the frequent *absence* of similar acts in a course of business relevant to show the *absence* of a plan, system or scheme. *United States v. Garvin*, 565 F2d 519, 520 (8th Cir. 1977). The evidence sought in the present case was to show the *absence* of the scheme alleged by the government to be one of the major schemes of the local La Cosa Nostra of which petitioner was charged as being a member. As in *Garvin*, the convictions should be reversed because petitioner's Constitutional right to compulsory process was violated.

** This theory was systematically presented throughout the trial through audio tapes, testimony and the government's oral argument.

B. ***Fifth Amendment: Due Process***

The Fifth Amendment ensures that no person shall be deprived of life, liberty or property without due process of law. With regard to the recording of private conversations and activities of individuals to be used against them for the purpose of depriving them of their life, liberty or property, Title 18 of the United States Code, Chapter 119 invokes what process is due to that individual.

Specifically, Title 18 U.S.C. §2518 (8)(a) requires that the process which is due for the use or disclosure of these recordings is as follows:

> "The contents of any wire, oral or electronic communication intercepted by means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon any order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a **prerequisite** [emphasis added] for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517."

The sealing issue in the present case is unique since the original tapes were timely sealed, but then unsealed, a condition in which some remained for up to two and one half (2½) years. The tapes

at issue here were recordings obtained from conversations of various individuals taken at a club in New York City. These tapes came to be referred to as the PALMA BOY TAPES.

The statutory framework for the handling of electronic surveillance is detailed and precise. The entire Chapter (119) of Title 18 presents strict requirements and suggests strict compliance. The reason for this detail is obvious: to protect one's right of privacy from unreasonable government intrusion through eavesdropping methods. It is urged that the government in the present case violated the strict requirements of this Chapter and that such a violation amounted to the deprivation of petitioner's Due Process rights.

In reviewing this issue, the Court of Appeals for the Second Circuit recognized the important purpose of the statutory sealing requirements. The court also recognized the need for a required re-sealing of the tapes after original unsealing by court order. The court, however, found that the time for re-sealing had not yet been reached in the present case. It is urged that the time for re-sealing in the present case (more than two years after the original unsealing order) had long since passed and the court's failure to impose this requirement on the government denied the petitioner Due Process of Law.

The Court of Appeals for the Second Circuit recognized that the statute envisions "continuous judicial scrutiny of the **entire process** [emphasis added] of obtaining and utilizing recorded conversations [*United States v. Gigante*, 538 F.2d 502, 506 (2d Cir. 1976)] yet held that a two and one half year period in which tapes remained unsealed under virtually unsupervised condition (in the hands of a private citizen, doing work for the government as an independent contractor) was satisfactory under the statute. Petitioner strongly urges that it was not. It is clear from the trial record that these tapes were handled on many occasions by many individuals, in total disregard of the intentions of the sealing laws

(both common law and statutory) and had been unsealed before petitioner was notified that the government intended to use them.

The appeals court held that re-sealing was not required, absent contrary instructions by the judge authorizing the unsealing, until the proceedings for which they were unsealed have concluded. The court went on to hold that the proceedings for which the tapes petitioner objected to (which was another case, not involving the petitioner) had not yet concluded, hence, the re-sealing requirement as they viewed it had not been triggered at the time the government sought to introduce them against petitioner. With regard to this critical issue, the appeals court has misconstrued the facts in the case. The case associated with the unsealing of the PALMA BOY TAPES was *United States v. Salerno*, No. 86 CR 245. The trial of the *Salerno* case was concluded on November 19, 1986, prior to the commencement of petitioner's trial. Petitioner was not related to the *Salerno* case in any way.

Further, the order authorizing the unsealing of the PALMA BOY TAPES (order of Honorable Mary Johnson Lowe, U.S. District Court Judge), authorized such "to make duplicate and enhanced copies" ... and required that upon the completion of the purposes for which the unsealing was allowed, the "tapes shall be re-sealed" by the government.

The normal practice is to make duplicates before sealing the originals in accordance with 18 U.S.C. 2518 (8)(a). Any need for continuing use of the tapes is easily served by the use of these duplicates. The "satisfactory explanation" which the Court of Appeals for the Second Circuit found for the absence of the seal was that there was a continued need for the use of these tapes (i.e., *Salerno* was not over yet). As argued above, this finding is erroneous. Further, even if true, it would not provide a satisfac-

tory explanation where the use of duplicates is so readily available and so often used.

The proof allowed by the PALMA BOY TAPES was central to a major issue of the most significant counts of the indictment (i.e., hearsay proof of membership in the organization — central to the two RICO counts). There was no direct proof in this case on the question of membership. The impact of these tapes was central to the conviction. As such, their admission into evidence in the face of statutory violation, acted to deny petitioner his Due Process rights.

C. *First Amendment: Freedom of Religion*

The petitioner's First Amendment right to free exercise of his religion was violated by the admission of photographs taken of the petitioner while he was attending various religious ceremonies. All of the photographs admitted into evidence were taken in the vicinity of a Roman Catholic Church. It was established at trial that petitioner was a Roman Catholic. The pictures depicted the area outside the entrance to the church and the petitioner and others were either going in or coming out of the church while religious ceremonies were being held.

To allow the government to claim that these attendances at religious ceremonies is evidence of some criminal association is a direct attack on the exercise of one's religion. Further, to allow the government to surreptitiously photograph the petitioner while attending these religious services tends to have a chilling effect on one's First Amendment right to freely exercise one's religion by attending such ceremonies. Such would have the tendency to create a situation whereby people would be reluctant to go to religious ceremonies, such as funeral masses for example, for fear that some government agent might be lurking in the bushes somewhere, taking pictures and trying to make some illegal connection with one's exercise of his religion.

In reviewing this question, the Court of Appeals for the Second Circuit reasoned that the investigation of suspected criminals is a compelling interest and the manner and location of the photographs taken bore a reasonable relationship to the governmental goal. This reasonable relationship was based upon the perception that it is rare that the government would have the opportunity to document the interactions among individuals engaged in RICO activity. It is urged that the appeals court misapplied the standard of review in that it failed to put the importance of the First Amendment in proper perspective.

In applying the analysis of *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), the Court of Appeals for the Second Circuit incorrectly found that the taking of photographs of petitioner in a religious setting was reasonably related to the governmental interest of investigating crimes and that the means used were not unduly broad so as to impact on a protected right. This is particularly true where, as here, the purpose for which the photographs were offered was to show the petitioner entering and leaving the church with persons allegedly connected to the criminal enterprise.

In finding that the taking of pictures in a religious setting is reasonable because the opportunities to obtain documented proof in these types of cases (RICO) is rare, the appeals court fails to recognize the breadth of surveillance techniques available to law enforcement in today's technology. One's First Amendment rights are too easily cast aside for this questionable rationale.

It is recognized that the governmental interest in criminal investigations is compelling, but so too is the First Amendment freedom in one's religion. Such religious freedom should not be compromised by giving the government free reign to accomplish that goal at the expense of the individual. This is more true in

light of the expansive options and technology at the disposal of the government in obtaining this evidence through other, less intrusive means.

CONCLUSION

For the reasons stated herein, it is respectfully requested that a writ of certiorari issue to review and reverse the judgment of the Court of Appeals for the Second Circuit of New York entered herein.

Respectfully submitted,

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